FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5549

MICHAEL TAYLOR - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the Court
of Appeals of Kentucky

BRIEF FOR RESPONDENT

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OPINION BELOW

The Opinion of the Court of Appeals of Kentucky (Appendix, hereinafter designated App., pp. 54-58) is reported as *Taylor* v. *Commonwealth,* Ky. App., 551 S. W. 2d 813 (1977).

JURISDICTION

The opinion of the Court of Appeals of Kentucky in File No. CA-152-MR was entered on April 1, 1977. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on June 29,

1977 (Petitioner's App., p. 59). The mandate of the Court of Appeals of Kentucky was issued on July 11, 1977 (App., p. 60). The petition for writ of certiorari was granted on November 28, 1977. The jurisdiction of this Court is invoked on the basis of 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of his constitutional right to due process by the refusal of the trial court to give a requested instruction on the presumption of innocence.
2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give a requested instruction on the indictment's lack of evidentiary value.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision petitioner has invoked is the Fourteenth Amendment to the Federal Constitution.

COUNTERSTATEMENT OF THE CASE

Respondent accepts petitioner's Statement of the Case as substantially correct and accurate. However, for the convenience of the Court, respondent believes that the Kentucky Court of Appeals succinctly capsulated the facts of this case as follows:

> "Michael Taylor was convicted by a Frankfort Circuit Court jury of violating Ky. Rev. Stat. Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening."

Additional facts and circumstances relevant to the issues raised by petitioner will be set forth in the respective arguments which follow.

SUMMARY OF ARGUMENT

It is not a part of an accused's right to a fair trial to have a state trial judge instruct the jury on the presumption of innocence. The requirement stated to lower federal trial courts in *Coffin* v. *United States,* 156 U. S. 432 (1895), that an instruction on the presumption of innocence was required was based upon a fundamental fallacy that this presumption is evidence in favor of the accused. This misconception has been corrected by this Court and the cases considered by this Court on this issue do not establish a constitutional rule that a fair trial by jury requires a court charge the presumption of innocence in addition to giving an adequate charge on reasonable doubt.

The highest appellate courts of the Commonwealth of Kentucky have consistently over the years held not only it unnecessary to give an instruction on presumption of innocence, even when requested and tendered, but that to give a presumption of innocence instruction would be misleading and would be an instruction too favorable to the accused. The rights of the accused are protected by the giving of an instruction on constitutional based standard of "beyond a reasonable doubt" and a definition of "reasonable doubt."

The presumption of innocence achieves its chief purpose as a procedural aid in compelling the state to assume and carry the burden of proving guilt, and the evidence produced must establish guilt beyond a reasonable doubt. The trial jury in the present case was adequately informed on the presumption of innocence by the voir dire interrogation of defense counsel and the prosecution and in the closing argument of the attorneys.

Before this Court may overturn a conviction resulting from a state trial in which a particular instruction was not given, it must be shown that the failure to give the instruction violated a right given to a defendant by the Fourteenth Amendment. This has not been shown in this case.

Moreover, there is no authority that would raise a requested instruction that an indictment lacks evidentiary value to a constitutional stature. An indictment in and of itself is never evidence of the guilt of the accused. However, where clear and correct instructions are given on reasonable doubt and the jury

has been informed by defense counsel that an indictment is merely a charging document and that it is not evidence, the resulting conviction is not invalid under the Fourteenth Amendment.

ARGUMENT

I.

Petitioner Was Not Deprived of His Constitutional Right to Due Process by the Refusal of the Trial Court to Give a Requested Instruction of the Presumption of Innocence.

This case involves one of the most basic principles extant in our criminal justice system—that there is something long referred to as a presumption of innocence for one accused of a crime. The question before this Court, however, is whether a criminal defendant has a constitutional right to an instruction on this presumption.

The respondent, hereafter "Commonwealth," would not begin to disagree with the proposition that the presumption of innocence is "a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams,* 425 U. S. 501, 503 (1976). However, the Commonwealth strongly disagrees with the petitioner, hereafter "Mr. Taylor," that as a part of the right to a fair trial, one accused of a crime is constitutionally entitled to have a state trial judge instruct the jury on the presumption of innocence.

Mr. Taylor argues that the refusal by a state trial judge to give a presumption of innocence instruction

unconstitutionally affects a substantial right protected by the Fourteenth Amendment. In support of his argument he cites this Court's decision and opinion in *Coffin* v. *United States,* 156 U. S. 432 (1895). This Court's decision in *Coffin* is neither controlling in the present case nor does it reflect an accurate analysis of the legal principle of presumption of innocence.

This Court held in *Coffin* that the failure of the District Court of the United States for the District of Indiana to give a requested charge on the presumption of innocence was error requiring reversal. The opinion of this Court in *Coffin* declared "the presumuption of innocence is evidence in favor of the accused introduced by the law in his behalf. . . ." 156 U. S. at 460. But as stated in IX Wigmore on Evidence § 2511, pages 409-410, a "notable academic deliverance. . . . by the master in the law of Evidence (Professor James Bradley Thayer), laid bare the fallacy (that the legal presumption of innocence is to be regarded by the jury as a matter of evidence) with keen analysis." See Thayer, Preliminary Treatise on Evidence at the Common Law, Appendix B, The Presumption of Innocence in Criminal Cases, page 553 (1898). Wigmore further noted that the concept stated in the holding in *Coffin* of the presumption of innocence as evidence to be considered in favor of the accused was subsequently discarded by this Court in *Agnew* v. *United States,* 165 U. S. 36 (1897), and *Holt* v. *United States,* 218 U. S. 245 (1910). Id., at 410, footnote 5. Both of these cases involved the refusal by a lower *federal* court to instruct the jury in *Coffin* terms, that is, a refusal to

instruct the jury to consider the presumption of innocence as evidence in favor of the accused. The Court in *Agnew, supra,* declared that an instruction that the presumption of innocence is evidence was objectionable because of having a tendency to mislead. 165 U. S. at 52. It should be and probably is now generally agreed that the later cases of *Agnew* and *Holt* from this Court have, in the federal view of it, corrected the misconception created by *Coffin* that the presumption of innocence is evidence. Thus, the requirement stated to the lower federal trial courts in *Coffin* that an instruction on the presumption of innocence was required was based upon a fundamental fallacy. And, as stated in *United States Ex Rel. Campagne* v. *Follette,* 306 F. Supp. 1255, 1257 (E.D. N.Y. 1969), "plainly the cases in the Supreme Court cannot be said to adumbrate a rule of constitutional rigidity that fair trial by jury requires a court charge the presumption of innocence whether requested or not in addition to giving an adequate charge on reasonable doubt."

Lest it be forgotten, this case before the Court is a *state* case. Some states may have a criminal code or rule provision requiring an instruction on the presumption of innocence. See, for example, *Reynolds* v. *State,* 332 So. 2d 27 (Fla., 1976). This does not mean that other states with a different rule or the absence of one are in violation of the Constitution. Moreover, other states have judicially determined, some based upon the error of this Court's decision in *Coffin,* that a presumption of innocence instruction should be given

when requested. See *Ealey* v. *State,* 232 So. 2d 620 (Ga. 1977). None of the known of state court decisions, however, have held that the reason the presumption of innocence instruction is to be given is because of the Due Process Clause of the Fourteenth Amendment of our Federal Constitution.

The Commonwealth believes this Court is also of the decided opinion that a refusal by a state court to instruct on the presumption of innocence is not a denial of due process. In a case coming to this Court from a state criminal court in North Carolina, Mr. Justice Brewer, speaking for this Court in *Howard* v. *Fleming,* 191 U. S. 126, 136 and 137 (1903), stated:

> "Again, it is said that there was no due process, because the trial judge refused to instruct the jury on the presumption of innocence. He did charge that the guilt of the accused must be shown beyond a reasonable doubt, and that on a failure in this respect it was the duty to acquit. He also explained what is meant by the term 'reasonable doubt.' The supreme court (of North Carolina) sustained the charge. Of course, that is a decision of the highest court of the state that in a criminal trial it is sufficient to charge correctly in reference to a reasonable doubt, and that an omission to refer to any presumption of innocence does not invalidate the proceedings. In the face of this ruling as to the law of the state, the omission in a state trial of any reference to the presumption of innocence cannot be regarded as a denial of due process of law."

It must be understood in *Howard* that this Court determined that there had been a failure to pre[illegible]

the alleged error of constitutional magnitude. Mr. Justice Brewer prefaced that part of the opinion quoted above by saying: 191 U. S. at 135

> "The highest court of the state has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial."

Nevertheless, in concluding the opinion, Mr. Justice Brewer stated: 191 U. S. at 137

> "The same questions were presented in the *habeas corpus* case, and as that comes to us from a Federal Court we have jurisdiction, and in that case the judgment will be
>
> Affirmed."

Thus, the determination in *Howard* that the refusal of a state court to instruct on presumption of innocence is not a violation of due process is not diminished. As in the *Howard* case, the Kentucky appellate court in the present case before this Court has determined that it is sufficient to charge correctly in reference to a reasonable doubt and this ruling should not be regarded as a denial of due process of law. The Commonwealth believes this Court has been and continues to be of that thinking. As recently as this Court's decision in *Patterson* v. *New York,* 432 U. S. 197, 201-202 (1977), it was stated in relevant part that:

> "It goes without saying that preventing and dealing with crime is much more the business of

the States than it is of the Federal Government, *Irvine* v. *California,* 347 U. S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is 'normally within the power of the State to regulate procedures under which its laws are carried out, *including the burden of producing evidence and the burden of persuasion,'* and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser* v. *Randall,* 357 U. S. 513, 523 (1958); *Leland* v. *Organ,* 343 U. S. 790, 798 (1952); *Snyder* v. *Massachusetts,* 201 U. S. 97, 105 (1934). (Emphasis supplied.)

The highest appellate courts of the Commonwealth of Kentucky have consistently held not only it unnecessary to give an instruction on presumption of innocence, even when requested and tendered, but that to give a presumption of innocence instruction would be misleading and would be an instruction too favorable to the accused. In *Commonwealth* v. *Stites,* 190 Ky. 402, 227 S. W. 574, 576 (1921), the Kentucky Court of Appeals, the then highest appellate court, said:

> "We have repeatedly written that the reasonable doubt instruction in criminal cases should closely follow the words of Code, § 238. Instruction No. 4 reads:
>
> 'The law presumes the innocence of the accused, and it is the duty of the jury, if they can reasonably do so, to reconcile all the facts and circumstances of the case with that presumption; and if, upon the whole case, you entertain a reasonable doubt of the guilt of the accused, or of any material facts necessary to constitute his guilt of the offense charged in the indictment, as stated in instruction No. 1, having been proven, then you should find the defendant not guilty.'

While the instruction complained of has often been given, and has been before this court where the defendant was appealing, and we have held it not prejudicial to him, because too favorable to him, we do not think it should ever be given, for it amounts to a brief argument *in favor of the defendant.* Mickey v. Commonwealth, 9 Bush, 593; Ward v. Commonwealth, 14 Bush, 233; Breeden v. Commonwealth, 151 Ky. 217, 151 S. W. 407; Minniard v. Commonwealth, 158 Ky. 210, 164 S. W. 804; Clary v. Commonwealth, 163 Ky. 48, 173 S. W. 171; Mearns v. Commonwealth, 164 Ky. 213, 175 S. W. 355. If we follow this rule, as we must, the jury will be instructed:

> 'If you entertain a reasonable doubt from the evidence, of the guilt of the accused, he is entitled to an acquittal.'
>
> This should not be enlarged or elaborated, for the Code provision does not warrant it." (Emphasis supplied.)

Kentucky's Criminal Code of Practice § 238 stated:

> "Reasonable doubt entitles defendant to acquittal. If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

(This Code provision is substantially incorporated into the present Rule 9.56 of the Kentucky Rules of Criminal Procedure). In a case from the Kentucky Court of Appeals following *Stites, supra,* in *Goodwin* v. *Commonwealth,* 214 Ky. 422, 283 S. W. 420 (1926), the court stated, in regard to an instruction similar to the one tendered in the instant case, that the tendered instruction was argumentative and therefore was properly refused. The court in *Goodwin* stated: 283 S. W. at 423

> "Instruction No. X, offered by appellants, was an argument in favor of the innocence of the accused and should never be given by a court to a jury, as has often been said by this court. It was sufficient for the court to say to the jury, 'If you have a reasonable doubt from the evidence that either of the defendants, C. A. Goodwin or Bryan Goodwin, have been proven to be guilty, then you will find him not guilty, and, if such doubt applies to both defendants, you will find both of them not guilty;' and it would have been improper for the court to have instructed the jury, as requested by appellants, that the law presumes the innocence of the defendants until their guilt has been proven beyond a reasonable doubt, and 'it is your duty, if you can reasonably do so, to reconcile all the facts and circumstances proven in the case with that presumption, and if upon the whole case you have a reasonable doubt of the defendants' having been proven guilty, you should find them not guilty.' We have so held in the cases of Brown v. Commonwealth, 198 Ky. 663, 249 S. W. 777; Mickey v. Commonwealth, 9 Bush, 593; Minniard v. Commonwealth, 158 Ky. 210, 164 S. W. 804; Clary v. Commonwealth, 163 Ky. 48, 173 S. W. 171; Commonwealth v. Stites, 190 Ky. 402, 227 S. W. 574."

Kentucky's courts have further stated that the rights of the accused are protected by the giving of an instruction on the standard of "beyond a reasonable doubt" and a definition of "reasonable doubt." *Mink* v. *Commonwealth,* 228 Ky. 674, 15 S. W. 2d 463 (1929); *Swango* v. *Commonwealth,* 291 Ky. 690, 165 S. W. 2d 182 (1942).

In the present case the trial court gave the following instructions: App. 40

> "The Court. All right. These are your instructions as to the law applicable to the facts you've heard in evidence from the witness stand in this case.
>
> Number one, you will find the defendant guilty under this instruction if and only if you believe from the evidence beyond a reasonable doubt all of the following: A. That in this county on or about February 16, 1976 and before the finding of the indictment herein, he the defendant stole a sum of money and a house key from James Maddox, 249 Rosewood, Frankfort, Kentucky; and B. in the course of so doing he used physical force on James Maddox. If you find the defendant guilty under this instruction you will fix his punishment at confinement in the penitentiary for not less than five nor more than ten years in your discretion.
>
> Number two, if upon the whole case you have a reasonable doubt as to the defendant's guilt you will find him not guilty. The term 'reasonable

> doubt' as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty."

These instructions follow nearly verbatim the suggested instructions on "reasonable doubt" contained in Sections 1.04 and 11.01 of Palmore's (Chief Justice of the Kentucky Supreme Court) *Kentucky Instructions to Juries, A Revision of Stanley,* Vol. 1, pages 4-5, 376-377. While Mr. Taylor, at pages 43 and 44 of his Brief for Petitioner, attacks the strength of the trial court's "reasonable doubt" instructions, we believe part of the court's opinion in *United States* v. *Pepe,* 501 F. 2d 1142, 1143 (10th Cir. 1974) is pertinent as a reply:

> "As an abstraction the concept of reasonable doubt is not susceptible to description by terms with sharply defined, concrete meanings. Resort must be to wording or language, the meaning of which will necessarily be colored by the experience of each individual. Thus while the term itself is common and readily associated by most individuals with our criminal justice system, it is unlikely that two persons would supply the same characterization of its meaning. These difficulties have been acknowledged by the Supreme Court, and the Court has expressed its doubts about the benefit of attempting a definition more elaborate than the term 'reasonable doubt' itself. Miles v. United States, 103 U. S. 304, 26 L. Ed. 481; Dunbar v. United States, 156 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390."

The Commonwealth does not argue or believe nor have the courts of review in this state ever held that there is not a difference between the principle of presumption of innocence and the standard of beyond a reasonable doubt. This Court, in *In Re Winship,* 397 U. S. 358, 365 (1970), citing *Coffin* v. *United States, supra,* stated:

> "The (reasonable-doubt) standard provides concrete substance for the presumption of innocence —that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law."

This Court also held in *Winship, supra,* possibly the first time so explicitly: 397 U. S. at 364

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

Mr. Justice Black, dissenting in *Winship,* noted: 397 U. S. at 377

> "The Court has never clearly held, however, that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution."

But the Commonwealth does not question the constitutional basis for the standard of beyond a reasonable doubt. "Long before *Winship,* the universal rule in

this country was that the prosecution must prove guilt beyond a reasonable doubt." *Patterson* v. *New York, supra,* 432 U. S. at 211. Kentucky Criminal Code of Practice § 238, *supra.* This standard is "a prime instrument for reducing the risk of convictions resting on factual error." *Winship,* at 363.

The bedrock principle of presumption of innocence places upon the state the burden of proving guilt. The presumption of innocence achieves its chief purpose as a procedural aid in compelling the state to assume and carry that burden of proving guilt, and the evidence produced must establish guilt beyond a reasonable doubt. See McCormick on Evidence, 2d Ed., at page 806, footnote 43. The jury in the present case did not try the case unaware of the presumption of innocence. See *Henderson* v. *Kibbe,* —— U. S. ——, 52 L. Ed. 2d 203, 212 (1977). The prospective and accepted jurors were informed and interrogated more in the voir dire examination on the presumption of innocence and reasonable doubt than on anything else. This is apparent from reading several pages of the Transcript of Evidence: App. 18-21

> "[9] Have any of you heard or know anything about this particular case?
>
> Have any of you ever had occasion or the necessity to take out a warrant or to institute criminal proceedings before?
>
> I take it by your silence that you haven't.
>
> I'm sure you all will agree to this final question as regards the principle of innocence or reasonable doubt. Do each of you all agree and understand that Mike Taylor as he sits there today is a

young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that in the event that at the conclusion of the evidence, you have a reasonable doubt then it is your duty to return a verdict of not guilty. Do each of you understand the principle of innocence, the requirement of reasonable doubt? That reasonable doubt must be removed in order to find a verdict of guilty?

Do each of you understand that principle and I try to make it as elementary as I can. Lawyers sometimes have a tendency to make things complicated but I hope I made it sufficiently clear.

[10] I take it by your silence that each of you does understand.

Thank you.

The Court: Take your list.

Mr. Corns: Commonwealth takes the jury, Your Honor.

The Court: Take your list, Mr. Judy.

Mr. Judy: Thank you, Your Honor. We'd like to deliberate for just a moment, if we could.

The Sheriff: Gus Smith, Christine Noblitt are excused.

The Court: Call two more jurors.

[Whereupon, Mr. William Sanders and Nancy Forsee were sworn by the Court.]

Mr. Corns: These questions will be directed to the last two members that have just joined the panel. Have you heard the questions I asked previously?

Mr. Sanders: Yes, sir.

Ms. Forsee: Yes, sir.

Mr. Corns: Having heard those questions do you know of any reason why either of you could not serve as a juror?

Mr. Judy, when he talked to the jurors, advised that each defendant is presumed innocent until proven guilty beyond a reasonable doubt. If you serve in this case will you follow that rule of law?

If, however, the Commonwealth does prove to your [11] satisfaction beyond a reasonable doubt that this defendant did commit the crime with which he's charged, will you return a verdict of guilty?

Do you know of any reason why, if you return a verdict of guilty, you could not fix his punishment between five and ten years in prison for second degree robbery?

If both of you serve will you give both the prosecution and the defense a fair trial?

Commonwealth passes, Your Honor.

Mr. Judy: May it please the Court, Mr. Corns. I also direct my attention to the last two who came on. You all were sitting in the back. Could you hear the questions that I generally asked?

Was there any question that I asked that you might have registered a reply in your mind that you would have answered if you had been sitting on the panel at that time?

Do either of you know socially or have you been represented by Mr. Corns or Mr. Prewitt?

Have either of you had the opportunity to take out a warrant initiating an action in court?

Do both of you subscribe to the principle of law and the Judge will instruct you that the defendant is presumed innocent until proven guilty with [12] sufficient proof to prove beyond a reasonable doubt for you to return a verdict of guilty?

Do you both recognize that it is equally a part of your duty as a juror to return a verdict of not guilty if you believe or have a reasonable doubt and that your duty is just as well served in returning a verdict of not guilty if you so believe as a guilty verdict if you believe he's guilty beyond a reasonable doubt?

Thank you.

The Court: Take your licks, Mr. Corns.

Mr. Corns: Commonwealth takes the jury, Your Honor.

The Court: Commonwealth accepts the jury.

Mr. Judy: Defendant accepts the jury, Your Honor."

The trial jury was most adequately informed and enlightened on the presumption of innocence by the voir dire interrogation of not only Mr. Taylor's trial counsel but also by the Commonwealth's attorney. Also, the presumption of innocence was hammered on in the closing argument of Mr. Taylor's trial counsel after the jury had been given the instructions by the court. Defense counsel argued: App. 43-44

> "Now, you've been given the instructions. As I indicated to you in the voir dire when we talked about the [41] questions and answers at the very beginning, that you all subscribe to the principle of the presumption of innocence, that Michael Taylor is presumed innocent—and I believe he is innocent—that that presumption remains with him throughout the trial. He has no burden to put on any proof and it is the, it's the obligation and responsibility of the Commonwealth to prove his guilt beyond a reasonable doubt.

Now, what is reasonable doubt? Well, I believe reasonable doubt is if you've heard one side of the testimony and you say well, I think that testimony is believable, the Commonwealth's testimony. Then you hear the defense testimony, the defendant testify and after the defendant gets off the stand you say I watched that fellow, I heard what he had to say and I don't, I just don't believe he's the one that did this thing.

Well, if you come to that impasse where you've got, where you believe the defendant equally as well as you do the prosecuting witness that's reasonable doubt. That's taking that Principle and applying it on a very basic level. That's the level that we have here."

Commonwealth's attorney also argued, in closing, presumption of innocence and reasonable doubt: App. 45.

"Before I talk with you further about the evidence let me mention a few things Mr. Judy has brought to your attention. First of all, reasonable doubt. This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocenee until [43] proven guilty beyond a reasonable doubt. That's just a presumption on his behalf and if you will look at the instruction that the Court gave you as to what reasonable doubt is, I think you will conclude the Commonwealth has far in excess proved beyond a reasonable doubt, without a question, this defendant committed the crime with which he's charged. Notice how the Court has defined for you in the instruction the term 'reasonable doubt,' means a substantial doubt, a real doubt, in that you must ask yourself not

whether a better case might have been proved but whether after hearing all the evidence you actually doubt that the defendant is guilty."

Certainly, the omission of an instruction on the presumption of innocence did not "so (infect) the entire trial that the resulting conviction violated due process." *Henderson* v. *Kibbe, supra,* 52 L. Ed. 2d at 214.

The presumption of innocence cannot be said to have such specificity of function so as to make out a deprivation of due process, if the case has been fairly presented to the jury and the jury has been properly advised on the burden of proof. See *United States Ex Rel. Campagne* v. *Follette, supra,* 306 F. Supp. at 1258. In that "traditionally, due process has required only the most basic procedural safeguards be observed" *(Patterson* v. *New York, supra,* 432 U. S. at 210), the Commonwealth submits that it is sufficient, constitutionally, that a state have instructions that have "as their predominant theme that the burden of proof . . . (is) upon the Government at every stage to prove guilt beyond a reasonable doubt." Mr. Justice Rehnquist, dissenting in *Cool* v. *United States,* 409 U. S. 100, 107 (1972). A judgment of conviction is "the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp* v. *Naughten,* 414 U. S. 141, 147 (1973). Instructions or the absence of a particular one is but one of the several components of a trial which may result in the judgment of conviction. *Id.* But also just as stated in *Cupp,* at 146, before a federal court may overturn a

conviction resulting from a state trial in which an instruction was used, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment," the Commonwealth contends in a state trial where a particular instruction was not given, even if failing to give such an instruction is "undesirable, erroneous, or even 'universally condemned,' " it must be shown that the failure to give this instruction violated a right given to a defendant by the Fourteenth Amendment. This Mr. Taylor has failed to do. The decision of the Kentucky Court of Appeals should be affirmed.

II.

Petitioner Was Not Denied His Constitutional Right to Due Process by the Refusal of the Trial Court to Give a Requested Instruction on the Indictment's Lack of Evidentiary Value.

Mr. Taylor's second argument is totally barren of a substantial federal question. The question presented to this Court here is simply does an accused have a right protected by the Due Process Clause of the Fourteenth Amendment to an instruction, when requested, that an indictment lacks evidentiary value. No authority has been cited and none is known that would raise such an instruction to a constitutional stature.

Long before the present case was reviewed by the Kentucky Court of Appeals, that court considered the

very argument here presented by Mr. Taylor. The Kentucky Court of Appeals in *Kelly* v. *Commonwealth,* 259 Ky. 770, 83 S. W. 2d 489, 490 (1935) stated:

> "Appellant argues that it is the duty of the court, upon request, to instruct the jury that an indictment is but a formal charge and furnishes no evidence of guilt. He relies upon 16 C.J. 983, § 2387. Various foreign, but no Kentucky, cases are cited in support of the text, and appellant quite frankly admits that there is no Kentucky decision on the question. We think that the 'reasonable doubt' instruction under section 238 of the Criminal Code of Practice amply protects the defendant, and that the trial court did not err in refusing the proffered instruction."

It is, thus, not disputed that an indictment in and of itself is never evidence of the guilt of an accused. But it is not error, let alone reversible error of constitutional magnitude, to fail to give an instruction in this regard.

Mr. Taylor cites several federal jurisdiction cases and a District of Columbia case, each of which have a central theme. As noted in *Whittlesey* v. *United States,* 221 A. 2d 86, 90 (D.C. 1966), it appears established by federal courts that when an information or indictment goes to the jury, and the defense counsel requests an instruction to the effect that the jury should not consider the information or indictment as evidence against the accused, a refusal to so instruct is reversible error. It would further appear that in federal courts whether the indictment or exhibits are taken into the jury room

rests with the sound discretion of the federal trial court. See *Little* v. *United States,* 73 F. 2d 861 (10th Cir. 1934), and also generally, *Garner* v. *United States,* 244 F. 2d 575 (6th Cir. 1957).

Again, this is not a federal case and there has never been asserted that the jury was permitted to take the indictment into the jury room with them. What may be the better practice required as a matter of judicial supervision by the various federal courts of appeals does not, without more, establish authority for requiring such an instruction as a matter of constitutional mandate. See *Cupp* v. *Naughten, supra,* 414 U. S. at 146. Under the circumstances of the present case, with the clear and correct instructions by the trial court on "reasonable doubt," coupled with the voir dire statements to the jury by defense counsel that an indictment is merely a charging document and that it is not evidence (App. 17), the resulting conviction of Mr. Taylor is not invalid under the Fourteenth Amendment.

CONCLUSION

Based upon the foregoing, the Commonwealth submits that Mr. Taylor received a fair trial. His trial was conducted within the law of the highest courts in Kentucky. Mr. Taylor was not deprived of any protected constitutional right. An accused is not entitled under the Fourteenth Amendment to an instruction on the presumption of innocence or that the indictment lacks evidentiary value. For these reasons, the

decision of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT F. STEPHENS
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CERTIFICATE OF SERVICE

I, Guy C. Shearer, one of counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by depositing three copies each of same in the United States mail, first class postage prepaid, this 2nd day of March, 1978, addressed to counsel for petitioner, HONORABLE J. VINCENT APRILE, II, Assistant Deputy Public Defender, State Office Bldg. Annex, Frankfort, Kentucky 40601.

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